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IN THE UNITED STATES SUPREME COURT

LEWIS DISIBIO and MARY DISIBIO
Petitioners

vs.

MISSION NATIONAL BANK
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The underlying issue in this case is whether a bank that takes over the accounts of a failed savings and loan, through the mediation of a federal receiver acting under FIERRA, accrues both initial freedom to alter the interest rates on all assumed-accounts, and continuing freedom to unilaterally rewrite the terms of those accounts in perpetuity. The immediate question for this Court is whether the Ninth Circuit panel, in its summary treatment of petitioners' appeal, so seriously departed from the proper course of judicial proceedings as to call for this Court's exercise of supervisory power, at least to the extent of GVR.

In this case, the Ninth Circuit denied oral argument and issued a one-and-a-half page memorandum disposition which failed to engage petitioners' arguments and authorities, and embodied obvious errors as to some of the basic facts of the case. The most plausible explanation for this decision-making would seem to be that the panel jumped to the conclusion that, in light of an amicus brief filed by the FDIC, petitioners' appeal could be summarily rejected, without more than cursory attention to petitioners' briefs and without oral argument. The panel appears to have given *Chevron* deference to an alleged FDIC policy, which, though purportedly well-established, has never been made public, and was never mentioned in the district court proceedings or decision herein, being raised for the first time in respondent's opposition brief and the amicus brief on appeal. On petition for rehearing and for oral argument, the Ninth Circuit panel did no more than delete one sentence from its memorandum disposition and substitute a different sentence, so as to (partially) correct one of its errors as to the basic facts of the case. Among petitioners' arguments that the panel failed to address, or even acknowledge, in any way, is the seemingly indisputable assertion that even if respondent successor bank had the initial right to make certain changes in the terms of petitioners' assumed-account contract, respondent did not have the right to make continuing unilateral changes in account terms over the subsequent life of the account.

The questions presented are:

1. Whether the most plausible explanation for the Ninth Circuit's decision-making in this matter is a grant of *Chevron* deference to the FDIC policy alleged in the FDIC's amicus brief on appeal, resulting in a preemption of California contract law by informal FDIC policy-making, contrary to the guidance of the case law of this Court and other circuits.

2. Whether a bank can continue to derogate the contractual rights of account-holders on the ground that the bank's 1990 agreement with a federal receiver, by which the bank took over the accounts in question from a failed institution, empowered the bank with permanent discretion to unilaterally rewrite the terms of the account contracts.

3. Whether parties appealing from a district court's grant of summary judgment have a due process right to something more than a cursory examination of and response to their arguments on appeal; whether there is a threshold beyond which an appellate court's inattention to or misconstruction of the record, cursory disposal of arguments, ignoring of relevant authorities, and denial of oral argument adds up to deprivation of due process of law.

4. Whether the Ninth Circuit, in its cursory treatment of petitioners' appeal, and its apparent deference to the FDIC, so seriously departed from the proper course of judicial proceedings as to call for this Court's exercise of supervisory power, at least to the extent of GVR.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

I. Introduction 1

II. Proceedings in the District Court 2

III. Petitioners' Appeal To the Ninth Circuit 4

IV. The Ninth Circuit's Memorandum Disposition and Petitioners' Request for Rehearing and Oral Argument 15

V. The Ninth Circuit's Response To Petitioners' Request for Rehearing and Oral Argument 21

REASONS FOR GRANTING THE PETITION 22

I. Introduction 22

II. If, as seems likely, the Explanation for the Ninth Circuit's Enigmatic Decision-Making in this Matter Is an Unspoken Grant of *Chevron* Deference to the FDIC Policy Alleged in the FDIC's Amicus Brief on Appeal, Such Would Make For an Improper Preemption of California Contract Law by Informal FDIC Policy-Making, Contrary To the Mandate of the Case Law of this Court and Other Circuits, and Implicating the Constitutional Rights of All Persons Situated Such as Petitioners 23

III. If the Explanation for the Ninth Circuit's Enigmatic Decision-Making in this Matter Is Inattention To The Record and Failure To Give Petitioners' Briefs a Serious Reading and Their Arguments a Fair Hearing, Then the Ninth Circuit Panel So Seriously Departed from the Proper Course of Judicial Proceedings as To Deprive Petitioners of Due Process of Law and To Call for this Court's Exercise of Supervisory Power, at Least To the Extent of GVR 29

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

1185 Avenue of the Americas Assoc. v. RTC, 22 F.3d 494 (2nd Cir.1994).....24

Ames v. Merrill Lynch, Pierce, Fenner & Smith, 567 F.2d 1174 (2nd Cir. 1977) 10

Atherton v. FDIC, 519 U.S. 213, 117 S.Ct. 666 (1997).....24

Bankwest, Inc. v. Baker, 411 F.3d 1289 (11th Cir. 2005)..... 25

Battista v. FDIC, 195 F.3d 1113 (9th Cir. 1999) 17

Board of Governors v. Dimensions Fin. Corp., 474 U.S. 361 (1986) 21, 24

Centennial Sav. Bank FSB v. U.S., 887 F.2d 595 (5th Cir. 1989) 27

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 104 S.Ct. 2778 (1984).....23

Christensen v. Harris County, 529 U.S. 576, 120 S.Ct. 1655 (2000)..... 23

Consumers Union of the U.S. c. Fed. Res. Bd., 938 F.2d 266 (DC Cir. 1991).....21

County Club Associates LTD. Partnership v. FDIC, 918 F.Supp. 429 (D.D.C. 1996) 6

Credit Union N.A. v. Board of Governors, 700 F.Supp. 1152 (D.D.C.1988) 21

De La Fuente v. FDIC, 332 F.3d 1208 (9th Cir. 2003) .....24 - 25

F.D.I.C. v. Ernst & Young, LLP, 216 F.R.D. 422 (N.D.Ill. 2003) 11

F.D.I.C. v. Ernst & Young, LLP, 256 F.Supp.2d 798 (N.D.Ill. 2003) 11

FDIC v. Bank of Boulder, 911 F.2d 1466 (10th Cir. 1990) 10

FDIC v. Marine Midland Realty Credit Corp., 17 F.3d 715 (4th Cir. 1994) 13

Federal Communications Com'n v. WJR, the Goodwill Sta., 69 S.Ct. 1097 (1949) 30

Federal Deposit Ins. v. Ernst & Young LLP, 374 F.3d 579 (7th Cir. 2004) 20, 28

Federal Deposit Ins. Corp. V. S.A.S. Associates, 44 F.Supp.2d 781 (E.D. Va. 1999).....27

First American Bank v. RTC, 30 F.3d 644 (5th Cir. 1994) 10, 12, 25

Franklin Bank v. FDIC, 850 F.Supp. 845 (N.D.Cal. 1994).....11

Hackel v. F.D.I.C., 858 F. Supp. 289 (D.Mass. 1994) 27

Han v. Mobil Oil Corp. 73 F.3d 872 (9th Cir. 1995) 8

In Re Qintex Entertainments, Inc., 950 F.2d 1492 (9th Cir. 1991) 25

In Re Bridgeport Jai Alai, Inc, 215 B.R. 651 (Bkrtcy.D.Conn. 1997) 27

In re Cutters, Inc., 104 B.R. 886 (Bankr.M.D.Tenn. 1989) 26

In Re Italian Cook Oil, 190 F.2d 994 (3d Cir. 1951).....27

In Re Parker North American Corporation, 24 F.3d 1145 (9th Cir. 1994) 12

In Re Pollock, 139 B.R.938 (9th Cir.BAP 1992) 26

John v. U.S., 247 F.3d 1032 (9th Cir. 2001) 28

Jugum v. Federal Sav. And Loan Ins. Corp.,
637 F.Supp.1045 (W.D.Wash. 1986) 10

Lawrence on Beha[illegible] Lawrence v. Chater,
516 U.S. 163, [illegible] S.Ct. 604 (1996).....2, 22

Lawson v. FDIC, 3 F.3d 11 (1st Cir. 1993) 7, 12

Lawson v. Fleet Bank, 807 F.Supp. 136 (D.Me. 1992) 7

Lawson v. Household Bank F.S.B., 20 F.3d 786
(7th Cir. 1994) 7

Litton Financial Printing Division v. N.L.R.B.,
501 U.S. 190, 111 S.Ct. 2215 (1991) 24

McCarron v. FDIC, 111 F.3d 1089,
(3rd Cir. 1977) 6

Monument Square Assoc, v Resolution Trust Corp.,
792 F.Supp. 874 (D.Mass 1991) 26

National Labor Relations Board *v. Bildisco and Bildisco*, 465 U.S. 513, 104 S.Ct. 1188 (1984)..... 27

Netherland v. Tuggle, 515 U.S. 951, 116 S.Ct. 4 (1995)..... 23

O'Melveny & Myers v. FDIC, 512 U.S. 79,
114 S.Ct. 2048 (1994) 10, 24, 25

Rey v. Lafferty, 990 F.2d 1379 (1st Cir. 1993) 26

Sharpe v. FDIC, 126 F.3d 1147 (9th Cir. 1997) 11, 25

Solid Waste Agency v. Army Corps of Engineers,
531 U.S. 159, 121 S.Ct. 675 (2001) 24, 28

Stewart Title v.Old Republic Nat. Title,
83 F.3d 735 (5th Cir. 1996) 27

U.S. v. General Battery Corp., Inc.,
423 F.3d 294 (3rd Cir. 2005) 25

United States v. Bass, 404 U.S. 336, 92 S.Ct. 515 (1971) ...24

United States v. King Features Entertainment, Inc.,
843 F.2d 394 (9th Cir. 1988) 17

Wachtel v. Office of Thrift Supervision,
982 F.2d 581 (D.C.Cir. 1993) 24

Waterview Management Co. v. FDIC, 105 F.3d 696
(D.C.Cir. 1997) 12, 25

Wells Fargo Bank, N.A. v. F.D.I.C., 310 F,3d 202,
(D.C. Cir. 2002) 25

WRH Mortg. Inv. v. S.A.S. Associates,
214 F.3d 528 (4th Cir. 2000) 27

STATE CASES

In Re Valley State Bank, 223 Cal.App.3d 221 (1990) 12

Filet Menu, Inc. v. CCL&G, Inc.
79 Cal.App.4th 852 (2000) 26

World Sav. & Loan Assn. v. Kurtz Co.,
183 Cal.App.2d 319 (1960) 26

FEDERAL STATUTES

12 U.S.C. §1821 ..... passim

12 U.S.C. §4301 2

28 U.S.C. §2106 .....1, 22

28 U.S.C. §1291 4

STATE STATUTES

California Code of Civil Procedure §348 4

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

There are no published opinions. The two district court opinions, the Ninth Circuit's memorandum disposition on appeal, and its order denying rehearing and oral argument are all reproduced in the Appendix ("Apdx.") attached hereto.

JURISDICTION

The Ninth Circuit's memorandum disposition was filed on April 11, 2005. A timely petition for rehearing and oral argument was denied on September 7, 2005 (except that the Ninth Circuit panel amended its memorandum disposition by deleting one sentence and substituting a different sentence). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent statutes are 12 U.S.C. § 1821(e) and 28 U.S.C. § 2106. Apdx. *infra*, 27a - 29a.

STATEMENT OF THE CASE

I. Introduction

The underlying issue in this case is whether a bank that takes over the accounts of a failed savings and loan, through the mediation of a federal receiver acting under FIRREA, accrues both initial freedom to alter the interest rates on all assumed-accounts, and continuing freedom to unilaterally rewrite the terms of those accounts in perpetuity. The immediate question for this Court is whether the Ninth Circuit panel, in its cursory treatment of petitioners' appeal, made such errors of law, and/or so seriously departed from the proper course of judicial proceedings, as to call for this Court's exercise of supervisory power, at least to the extent of GVR.

In this case, the Ninth Circuit denied oral argument and issued a one-and-a-half page memorandum disposition declining to seriously engage petitioners' arguments, and embodying obvious errors as to some of the basic facts of the

case (Apdx. pp. 2a - 3a). The most plausible explanation would seem to be that the panel jumped to the conclusion that, in light of an amicus brief filed by the FDIC, petitioners' appeal could be summarily rejected, without more than cursory attention to petitioners' briefs and without oral argument. The panel appears to have given *Chevron* deference to an alleged FDIC policy, which, though purportedly well-established, has never been made public, and was never mentioned in the district court proceedings or decision, being raised for the first time in respondent's opposition brief and the FDIC amicus brief on appeal. On petition for rehearing and for oral argument, the Ninth Circuit panel did no more than delete one sentence from its memorandum and substitute a new sentence, so as to (partially) correct one of its errors as to the basic facts. Id. p. 1a.

The fact that the case law which the party requesting GVR relies on was actually briefed in the court below does not stand in the way of GVR in cases "where the lower court's order shows no sign of having applied the precedents that were briefed." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 116 S.Ct. 604, 608. This is demonstrably such a case.

Because the essence of this petition has to do with the apparent failure of the court of appeal to give petitioners' briefs a serious reading and petitioners' arguments a fair hearing, a substantial exposition of the history of argument below is required. The facts stated, *infra*, were proffered and argued below, and are offered here to show what was before, and passed over by, the court of appeal.

II. Proceedings in the District Court

Petitioners Lewis and Mary diSibio filed the complaint in this action in September 2001, in the U.S. District Court for the Northern District of California, alleging violation of the Truth In Savings Act ("TISA"), 12 USC §4301, and state law contract and statutory violations, all against Mission National Bank and Mission National Bank only. The diSibios were owners of an interest-bearing negotiable order of withdrawal ("NOW")

account at Mission National Bank ("MNB") with regard to which they alleged MNB had committed said violations on an on-going basis throughout the 1990s (ORDER, Apdx. p. 5a). Jurisdiction of the district court was based on 12 USC § 1331.

The diSibio NOW account had originally been with City Federal Savings and Loan Association ("City Federal"). In April 1989, City Federal became insolvent, but continued operating under a conservator (Apdx. 6a). In May of 1990, City Federal was taken into receivership by the Resolution Trust Corporation ("RTC"), and was then merged into MNB through the instrumentality of a Deposit Insurance Transfer and Asset Purchase Agreement ("DITAPA") between MNB and the RTC, pursuant to FIRREA (the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 USC §1821). The diSibios received no notice of the insolvency, receivership, conservatorship, or DITAPA. Apdx. 6a, 11a, n9.

The diSibios' complaint contended that on taking over their account from City Federal, MNB became obligated to meet the contractual terms of that account as they existed between the diSibios and City Federal under California law. As regards such deposit contracts, MNB was City Federal's successor in interest, pure and simple. The diSibios further contended that MNB knowingly violated those obligations in a variety of ways and on a continuing basis, and committed multiple TISA violations, throughout the 1990s. Apdx. 16a - 22a.

For the first year of litigation, MNB did not contest the diSibios' allegation of contractual continuity between MNB and City Federal (Apdx. 16a - 19a); indeed, in the Joint Case Management Conference Statement and Proposed Order of February 12, 2002, MNB stipulated that "Bank is the successor in interest to City Federal Savings and Loan Association ... Plaintiffs' original deposit agreement and attendant rights and obligations were transferred to Defendant by the Resolution Trust Corporation ... on or about May 18, 1990." During this period, it appeared that the only defense to liability MNB contemplated was one relying on various statutes of limitation,

or parallel arguments such as waiver, estoppel, or laches (Apdx. 22a - 26a).

In MNB's papers on its February, 2002, motion for judgment on the pleadings, and at the hearing on the motion, MNB repeatedly portrayed its contractual relationship with the diSibios as a simple continuation of the contractual relationship between City Federal and the diSibios. In opposing MNB's motion, the diSibios argued that, in assuming City Federal's insured deposits, MNB had assumed all of City Federal's concomitant liabilities and obligations. MNB neither denied the diSibios' assertions nor put forward the DITAPA as the basis for any defense (MNB did not produce a copy of the DITAPA in its Rule 26 disclosures). The district court denied MNB's motion, finding that under California Code of Civil Procedure §348, there is no time limitation on claims against banks for mishandling deposit accounts. Apdx. 26a.

On its February, 2003, motion for summary judgment, MNB argued, for the first time and without moving to withdraw its stipulation to the contrary, that as a matter of both federal banking law and contract interpretation (as applied to the DITAPA), MNB had never assumed the preexisting deposit contracts between City Federal and account holders such as the diSibios. MNB argued that there was no continuity whatever between the diSibios' deposit contract with City Federal and the diSibios' deposit account with MNB, because putting a depository institution into receivership under FIRREA *always* results in *automatic* cancellation of the established interest rates on all deposits. On March 25, 2003, the court issued its ruling granting summary judgment and ordering that the diSibios' action be dismissed in its entirety with prejudice. Apdx. 4a, 5a.

III. Petitioner's Appeal to the Ninth Circuit

The diSibios, in pro se, timely filed an appeal with the Ninth Circuit, which had jurisdiction under 28 U.S.C. § 1291.

Petitioners' argument on appeal, in outline, was as follows: On summary judgment, MNB argued that under federal

banking law, putting a depository institution into receivership always results in automatic cancellation of the established interest rates on deposits held by the institution. But in fact there is no authority whatever for this position, and both statutory language and case law contradict it. Such statutory and case authority make clear that cancellation of preexisting contracts of failed depository institutions is never automatic unless the institution is liquidated without transfer of contracts to a successor institution.

There is no statutory authority empowering a receiver of a failed depository institution to abrogate the terms of the deposit accounts held by a failed institutions' depositors, except upon complete liquidation of the failed institution. The claim that the contract repudiation power granted to federal receivers under FIERRA is applicable to the contracts establishing insured consumer deposits is unreasonable in light of the basic purpose of that statutory scheme and the complete absence of any Congressional statement or legislative history to that effect. When, instead of institutional liquidation and payoff of insured deposits, deposit accounts are transferred to and assumed by a successor institution, such transfer necessarily carries with it the assumption of the preexisting deposit account terms and obligations by the successor financial institution.

If, however, deposit contracts are found to be subject to repudiation under §1821(e) (Apdx. 18a), then such repudiation must be an all or nothing procedure. A deposit contract is, as a matter of law, a single, indivisible contract that cannot be parsed; a receiver cannot split it apart, repudiating some elements and transferring other elements to a successor institution. The interest rate term in particular is essential and integral to the entire contract and not severable. When a depository institution is being liquidated and insured deposits paid off, the federal insurer can parse a deposit into an insured amount and an uninsured amount, but absent institutional liquidation, when dealing with a deposit account, a receiver must either keep the whole obligation or transfer the whole obligation. If a deposit

account is transferred from a receiver to a successor institution, it is transferred *en grosse*. There is no federal statutory authority, and no state law authority, for "splitting" deposit accounts into a component of principal and a component of interest rate, transferring the former but not the latter.

Even were it held that the RTC, as receiver for City Federal, was empowered to parse the City Federal deposit contracts into component parts and to transfer the component of principal to MNB, while repudiating the interest-rate component, the RTC in fact took no such action with regard to accounts of the type held by the diSibios, and hence such accounts were transferred to and assumed by MNB in their entirety. Under FIRREA, contract repudiation never occurs automatically, but requires the receiver to make a determination that grounds exist justifying repudiation and to somehow register that determination. In order to repudiate a preexisting contract of the failed institution, the receiver must make a finding that continued obligation on that contract would be burdensome. 12 USC Section 1821(e)(1)(B). Apdx. 27a. *McCarron v. FDIC*, 111 F.3d 1089, 1094-95 (3rd Cir. 1977) (valid repudiation under FIRREA requires that a receiver actually determine that a contract or particularized class of contracts is burdensome, and communicate repudiation of such contracts in an unambiguous manner). Failure to properly repudiate a preexisting contract "results in a continuation of the contractual obligation and the application of contractual principles to the dispute." *County Club Associates LTD. Partnership v. FDIC*, 918 F.Supp. 429, 437 (D.D.C. 1996).

Where it is alleged that a receiver parsed the contracts of a failed entity and transferred some aspects and not others to a successor entity, the requirement that repudiation be clear, definite and unambiguous applies with particular force. And if such "splitting" is to be countenanced at all where the contract at issue is one which is indivisible under the governing state law, then surely the emphasis on the requirement that repudiation be clear, definite, and unambiguous must be

redoubled yet again. Even the case law on which MNB, and the district court, rely (the *Lawson* cases[1]) confirms that repudiation of deposit interest rates exists only where it is established by the specific language of the agreement between the federal receiver and the successor institution.

In the instant matter, the only arguable deposit interest-rate repudiation present in the DITAPA appears in Section 2.2 and applies only to "time savings deposits." The diSibios' account is a NOW account, which is a hybrid savings-transaction account (Apdx. 10a). NOW accounts are not "time savings deposits." MNB's argument, accepted by the district court, that in this DITAPA the term "time savings deposit" is a catchall phrase intended to encompass every possible form of savings account is completely unsupported, constitutes an unreasonable reading of the language of the document, and is contradicted by the fact that "time deposit" and "time savings deposit" both commonly refer to deposits with a set duration and a penalty for early withdrawal (neither of which applies to NOW accounts).

Furthermore, reading Sections 2.2 and 2.5 of the DITAPA together establishes that there was no general repudiation of City Federal account contracts (Apdx. 10a, n8). Section 2.5(a) states three possible outcomes for a City Federal depositor: (1) MNB pays the depositor off, or (2) MNB executes a new deposit agreement with the depositor, or (3) the depositor ratifies MNB's "assumption of the *deposit contract* between the depositor" and City Federal (emphasis added). This makes it clear that no general or automatic repudiation of preexisting deposit contracts was contemplated and that the RTC and MNB recognized and accepted that depositors had the option of ratifying MNB's assumption of their City Federal deposit *contracts*, absent any provision of the DITAPA to the contrary.

Lastly, even if it were held that the RTC was empowered to

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[1] *Lawson v. FDIC*, 3 F.3d 11 (1st Cir. 1993); *Lawson v. Fleet Bank*, 807 F.Supp. 136 (D.Me. 1992); *Lawson v. Household Bank F.S.B.*, 20 F.3d 786 (7th Cir. 1994)

abrogate the preexisting interest rate terms of deposit contracts, and in fact did so, MNB necessarily inherited and was bound by the other aspects of the preexisting deposit account contracts. MNB, under its own argument, assumed the preexisting contracts, with abrogation of the interest-rate term. Accordingly, MNB must defend against plaintiffs' claim that the City Federal contract did not give City Federal the right to change contract terms unilaterally. If that claim by plaintiff is upheld, then, even if MNB had the initial right to change plaintiffs' interest rate to correspond with the MNB passbook savings rate at the time of assumption, MNB did not have the right to make continuing unilateral changes in the account terms over the subsequent life of the account. *Han v. Mobil Oil Corp.* (9th Cir. 1995) 73 F.3d 872 (under California law, modification of contract that leaves purpose of original contract intact supersedes only the terms to which the modification relates). This has been completely ignored.

The diSibio reply brief on appeal argued, in outline, as follows: MNB's opposition brief on appeal contains no mention whatever of §2.5 of the DITAPA, and studiously avoids the fundamental fact that in none of the cases relied upon by MNB did the purchase and assumption agreement contain any language equivalent to this DITAPA provision. MNB gives no serious attention to the issue of the indivisibility of contracts, the role of state law in deciding such issues, and the intersection of this issue with the repudiation issue.

For the most part, MNB and the FDIC both rely on (1) what amounts to a public policy argument, and (2) specious factual claims as to the similarity in language between the DITAPA herein and the purchase and assumption agreements in the *Lawson* cases. Both MNB and FDIC insist that the instant case is on all fours with the *Lawson* cases and that the *Lawson* decisions are therefore controlling. Both MNB and the FDIC completely ignore the presence in the DITAPA of §2.5 and the absence of any such provision from the *Lawson* agreements, and also ignore the key differences in language between

DITAPA §2.2 and the equivalent clauses in the *Lawson* agreements. It is the diSibios' position, in contrast, that the presence of §2.5 in the DITAPA is significant, that the absence of any such provision in the *Lawson* agreements is significant, and that the language differences between §2.2 of the DITAPA and the equivalent provisions in the *Lawson* agreements are also significant. To put the point in formulaic terms: the DITAPA §2.2 language plus the presence of §2.5 makes for a very different gestalt, and legal force and effect, than the *Lawson* agreement language plus the absence of §2.5. If we were dealing with the latter equation rather than the former, this would be a different case. See Apdx. 10a, n8, 11a.

MNB and FDIC present the May 1990 transaction between MNB and the RTC as simple, straight forward, and amenable to definitive construction through the exercise of common sense and recourse to what are alleged to be the obvious mutual intentions of the parties. MNB's and FDIC's justification for their simple-minded approach and inattention to (what they would like to pass off as insignificant) detail is that any and all such considerations are overwhelmed and rendered inconsequential by the context of the savings-and-loan crisis, by the repudiation power granted to federal receivers by Congress under FIRREA, and by a "long-standing policy" of the FDIC that banks taking over deposits of failed institutions be allowed "to set the interest rates on the transferred deposits without regard to the rates paid by the defunct institution." But legal principles still matter; state law still matters; the particulars of contractual language still matter.

There Is No Evidence or Authority for the Existence or Validity of the General Policy Re Interest-Rate Repudiation Asserted by the FDIC in Its Amicus Brief. The FDIC Amicus brief argues that by "long-standing policy, the FDIC's transfer contracts typically allow the acquiring institution to set the interest rates on the transferred deposits without regard to the rates paid by the defunct institution." But the FDIC presents neither any evidence nor any authority supporting the existence

or the legal validity of any such policy. If such policy is of such long standing and so widely used, why is it not evidenced in writing in FDIC manuals or opinion letters? Why has it never been discussed or even referenced by Congress? Why is there no statute or regulation setting it out or authorizing it? Why is there no case law in which such policy is set out and explained (no such general policy is mentioned in the *Lawson* cases)? Why was such policy inoperative in *FDIC v. Bank of Boulder*, 911 F.2d 1466, 1473 (10th Cir. 1990) and in *First American Bank v. RTC*, 30 F.3d 644, 6 (5th Cir. 1994). And why has it taken so long for any mention of this long-standing policy to surface in this case?

Whatever the answers to the foregoing questions might be, it is well-established that the litigation positions taken by a governmental agency in an amicus brief are simply arguments of counsel and do not constitute agency "interpretations" of statute or regulation to which courts owe any deference. *Ames v. Merrill Lynch, Pierce, Fenner & Smith*, 567 F.2d 1174, 1177, note 3 (2nd Cir. 1977); *Jugum v. Federal Sav. And Loan Ins. Corp.*, 637 F.Supp.1045, 1050 (W.D.Wash. 1986) (absent evidence that position advanced by FSLIC is official position of the agency, "interpretations" put forward by counsel for FSLIC are not entitled to deference).

The Powers of Federal Receivers Under FIRREA Have Never Been as Comprehensive or Clear Cut as MNB and the FDIC Claim. The diSibio Opening Brief pointed out that the Supreme Court, subsequent to the *Lawson* decisions, had ruled that courts must fill gaps in FIRREA by looking to state law. *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87, 114 S.Ct. 2048, 2054 (1994). The diSibio brief went on to present the *Waterview Management* court's explanation of the continuing forceful presence of state contract law within FIRREA's domain, and to note the Ninth Circuit's approving citation of *Waterview Management* in *Sharp v. FDIC*. The diSibios elaborated the application of this view to MNB's claim that §1821(e) gave federal receivers the power to ignore the

indivisibility of contracts under state law by repudiating some elements of such contracts while transferring other elements. The diSibio Opening Brief cited extensive case authorities on these issues. To those should be added *F.D.I.C. v. Ernst & Young, LLP*, 256 F.Supp.2d 798, 805 (N.D.Ill. 2003):

> The plain text of §1821(e) provides for the repudiation of "a contract," rather than a provision thereof. The statute does not permit the FDIC to repudiate only those provisions of a contract with which it is dissatisfied.

(The FDIC actually spent the tax-payers' money moving the court to alter and amend the judgment to remove the above quoted language! The motion was denied. *F.D.I.C. v. Ernst & Young, LLP*, 216 F.R.D. 422 (N.D.Ill. 2003)). Both MNB and FDIC have essentially ignored all of this in their briefs, simply continuing to insist on their established positions without engaging the diSibios' arguments and authorities.

There is no question that FIRREA gives federal receivers broad powers to deal with the creditors of failed institutions in general, and the parties to the type of contracts specifically enumerated in §1821(e) in particular. Indeed the relevant basic purpose of FIRREA is to establish

> a comprehensive procedure for presentation and adjudication of *nondepositor creditor claims* against failed institutions. FIRREA limits recovery on an unsecured *general creditor claim*... [emphasis added]

Franklin Bank v. FDIC, 850 F.Supp. 845, 847 (N.D.Cal. 1994). But there is simply nothing anywhere in FIRREA that suggests that Congress meant to give federal receivers the same kind of broad power and discretion over the fate of insured depositors, or over all those who have dealt, pre-receivership, with failed institutions, regardless of circumstance.

For purposes of making its repudiation argument stick, MNB has tried to characterize the diSibios as creditors. But such characterizations by the FDIC are not to be taken for granted. In *Sharpe v. FDIC*, 126 F.3d 1147,1156 (1997), on the

issue of whether the plaintiffs were creditors, the court found:

> Were we to endorse the FDIC'S assertion that the Sharpes are creditors for the purpose of FIRREA, the FDIC would be free to breach any pre-receivership contract, keep the benefit of the bargain, and then escape the consequences by hiding behind the FIRREA claims process.

That the FDIC would file an amicus brief presenting unsupportable arguments is no surprise. The FDIC and the RTC have been notorious for over-generalizing and over-reaching in legal argument. See Sharpe, supra, 126 F.3d at 1155-57; *Waterview Management Co. v. FDIC*, 105 F.3d 696, 699 (D.C.Cir. 1997); *First American Bank v. RTC*, 30 F.3d 644, 6 (5th Cir. 1994); *In Re Parker North American Corporation*, 24 F.3d 1145, n7 (9th Cir. 1994); *Lawson v. FDIC*, 3 F.3d 11, 14 (1st Cir. 1993); *In Re Valley State Bank*, 223 Cal.App.3d 221, 223 (1990). As the *Waterview Management* court commented, 105 F.3d. at 701:

> In response to a question at oral argument, counsel for the RTC argued that, according to the agency's reading of §1821(d)(2)(G)(i)(II), even an easement that existed prior to receivership would be 'preempted' out of existence without any compensation to the holder, because such an interest impairs the government's ability to transfer the asset. This position is quite astonishing. To read the statute, as the RTC suggests, to permit a federal agency acting as conservator or receiver to sell assets in disregard of all pre-receivership rights, raises significant constitutional questions under the taking clause.

Thus there are plenty of grounds to characterize MNB and FDIC as jumping to simplify, over-generalize, conflate, and over-reach. They must be required to slow down and engage the diSibios' arguments and authorities. At the very least, as the diSibio Opening Brief emphasized, MNB must be required to make a persuasive case that the particular language of the DITAPA effectively meets the following imperative:

Where it is alleged that a receiver parsed the contracts of a failed entity and transferred some aspects and not others to a successor entity, the requirement that repudiation be clear, definite and unambiguous applies with particular force.

> Given the potentially inequitable nature of such transfer, the power to so separate claims should only be permitted upon a perfectly clear intent to do so. Such an intent was not evidenced in the Purchase and Assumption Agreement between [the receiver] and [the successor bank]. When [the successor bank] assumed the benefits of [the preexisting contract], it also assumed the attendant liabilities.

FDIC v. Marine Midland Realty Credit Corp., 17 F.3d 715, 720 (4th Cir. 1994). And if such "splitting" is to be countenanced at all where the contract at issue is one which is indivisible under the governing state law, then surely the emphasis on the requirement that repudiation be clear, definite, and unambiguous must be redoubled yet again.

The Weakness of the Public Policy Argument. The public policy argument presented by MNB and FDIC amounts to saying that an emergency situation required that the RTC, and banks that take over failed institutions, be allowed to do whatever they saw fit. MNB's brief proceeds as if there really is not any need for careful, in-depth legal analysis in this case, because the context of the savings-and-loan crisis and the RTC's Congressional mandate to do what was necessary to deal with that crisis are all that matter. MNB portrays itself as simply having been willing to lend a hand when called upon to do so, and, in effect, asks to be treated in the spirit of Good Samaritan statutes. MNB studiously avoids any mention of either the $26.5 million in cash it received as part of the deal, or the arbitrary and dishonest manner in which it carried on its relationship with the diSibios after assuming their account. MNB makes no mention at all of the diSibios argument regarding the necessary existence of some contract between MNB and them and the on-going violations by MNB after it took over from City Federal.

But MNB was not acting as a Good Samaritan or out of devotion to its community or the public welfare. MNB was simply grabbing a business opportunity. This merger constituted a huge augmentation of MNB's customer base and cash on hand. MNB's determination to treat this as coming with no strings attached, no obligation to pay interest, no obligation to ensure that City federal transferees actually understood what was happening (and the RTC's willingness to let MNB get away with that) meant that this merger constituted, at the least, a major short-term windfall for MNB— given that a substantial portion of the City Federal transferees could be counted on to leave their money with MNB for substantial periods simply out of inertia, no matter how low MNB set interest rates. As the diSibios illustrate, absent a forthright and transparent process, many depositors are likely to be slow to figure out what's going on and to conclude that they ought to investigate their rights and explore their options. The plain fact is that MNB took in $26.5 million overnight without having to offer competitive rates of interest in order to attract those deposits—and thereafter MNB got away with treating transferred accounts any way it pleased, if the diSibios experience is any measure. This looks more like a sweetheart deal than public service.

Why should both the receiver and the assuming bank need the freedom to completely ignore the pre-existing contract rights of the failed institution's depositors? Why should the receiver and the bank be excused from making any investigation whatever into such matters? Here the conservatorship was in place for a year before the transfer to MNB was effected. During that year, apparently no one investigated the nature of City Federal's deposit contracts and no one made inquiries of, consulted with, or provided information or notice to City Federal depositors (Apdx. 11a, n9). In other words, there was nothing like due diligence on the part of either the conservator, the receiver, or MNB at any point in the process. And there was nothing like transparency, rather just the opposite. The claim that such manner of proceeding is necessary to protect public

confidence in the banking system is right out of Alice in Wonderland.

Even under MNB's reading of the law, DITAPA §2.5 should have meant that every depositor was contacted and told something like: "Here's the new deposit contract we can offer you, or you can be paid off and take your money elsewhere, and if you choose to be paid off, or if you refuse these options, you may have a claim against the RTC for damages and you need to file within a certain time-frame." If MNB was simply a Good Samaritan, or innocent bystander, lending the RTC a hand in minimizing the damages from City Federal's failure, why the gross lack of forthrightness and transparency -- continuing for a full decade? The obvious answer is that MNB was knowingly taking advantage of the non-transparency of the situation, and of inertia and ignorance among City Federal depositors, to capitalize on a windfall opportunity.

IV. The Ninth Circuit's Memorandum Disposition and Petitioners' Request for Rehearing and Oral Argument

In petitioning the Ninth Circuit for panel rehearing and for oral argument, the diSibios recited and argued against the panel's memorandum disposition as follows: The panel's one-and-a-half page memorandum disposition both attributes to the diSibios positions they have never taken, and completely overlooks key factual and legal arguments, and supporting legal authorities, that the diSibios did set out in their opening and reply briefs (Apdx. 2a). Under FRAP 40(a)(2), a party may petition for rehearing where it appears clear that the court, in its decision of the matter, has overlooked or misapprehended important facts or points of law. Here we have an extreme instance of such judicial slippage and misapprehension. Comparing the positions that the diSibios take in their briefs and the positions attributed to them in the court's memorandum, it is impossible to believe that the diSibios' briefs have been given a serious reading. Given the panel's denial of oral argument, where such issues could have been raised, this means that the diSibios have yet to be given a meaningful hearing.

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The diSibio briefs (opening and reply) contain 75 pages of serious, competent factual and legal argument -- by no means the kind of rantings sometimes produced by pro se plaintiffs. There is a lack of fundamental fairness in the Court's failure to give these arguments a serious reading and a fair hearing.

The Panel's Fatally Flawed Memorandum Disposition. The panel's one-and-a-half page memorandum consists of five paragraphs (a sixth paragraph denies the diSibio request for judicial notice). In the first paragraph, the court states the nature of the diSibio complaint as being that federal and state law violations "occurred during the Resolution Trust Corporation's...placement of City Federal Savings and Loan Association...into receivership with Mission National Bank" [sic!] (Apdx. 2a - 3a). The second paragraph of the memorandum holds that "the district court properly dismissed the diSibios claims against City Federal because they failed to exhaust their administrative remedies before the RTC" (Id. 3a). All of this is simply factually wrong. In fact, the diSibios have *never* brought *any* claims against City Federal. The one and only defendant ever named in this action is MNB. The only causes of action in the diSibio complaint are for breaches of the Truth in Savings Act, and breaches of California contract law and consumer protection statutes, all committed by MNB *after* the completion of the RTC's transfer of the City Federal accounts to MNB, including recurring breaches committed by MNB years after that transfer and years after the termination of the federal receivership. All this is completely overlooked by the Court. It would appear that whoever drafted the Court's memorandum never read the diSibio complaint and never attended closely to the diSibio briefs.

The third, and central, paragraph of the Court's memorandum states that the district court "properly held that the terms of the receivership contract between RTC and MNB — [the "DITAPA"] — clearly and unambiguously provided that MNB would assume only certain, limited obligations (Apdx.

3a). *See United States v. King Features Entertainment, Inc.*, 843 F.2d 394, 398 (9th Cir. 1988)." Quite true, but, by itself, utterly meaningless. Has any contract ever provided that a party assumes *un*certain, *un*limited obligations? Would not such a contract be entirely unenforceable? The citation to *U.S. v. King Features* is unhelpful, indeed it amounts to pure boilerplate, as that case stands simply for the rule that "summary judgment is appropriate when the contract terms are clear and unambiguous, even if the parties disagree as to their meaning." The memorandum says nothing at all about the difference between the diSibio analysis of the "certain, limited obligations" assumed by MNB and MNB's (or the Court's) analysis of those obligations. Yet that argument is the very heart of the case.

The memorandum's third paragraph continues and concludes: "Contrary to the diSibios' contention, the...DITAPA empowered RTC to effect lower interest rates on deposit accounts after MNB assumed City Federal's administration, because higher rates were burdensome ... See 12 U.S.C. §§ 1821(e)(1)(B) and (C); *Battista v. FDIC*, 195 F.3d 1113, 1116 (9th Cir. 1999)." One hardly knows where to begin dismantling this sentence. It was never the DITAPA that empowered the RTC to do anything. It was Congress, through FIRREA, that empowered the RTC to issue the DITAPA and offer it to MNB; or to work with MNB in drafting the DITAPA to both the RTC's and MNB's satisfaction, and then agree on it. Through the DITAPA, the RTC conveyed certain property rights and contract rights to MNB, including, purportedly, the alleged right to set interest rates on certain kinds of accounts at lower levels than they had been set by City Federal. These lower rates were then specified and effected, within bounds set by the DITAPA, by MNB, not by the RTC. And there is no record of the RTC ever having made any determination that the pre-existing City Federal interest rates on NOW accounts were burdensome. The diSibios contend that the preexisting City Federal interest rates were broken not because of an RTC finding of burdensomeness, but because MNB wanted a

windfall and the RTC was willing to make a sweetheart deal purporting to authorize MNB to create that windfall, at the expense of City Federal depositors. The Court's citation to *Battista v. FDIC* in this context is incomprehensible. *Battista*'s only subject is the pursuit of damages against the FDIC on repudiated employment contracts. This is no answer at all to the diSibio's arguments and extensive legal authorities.

The memorandum's fourth paragraph states, in its entirety: "We reject the diSibios' contention that the money deposited into their NOW account was not subject to the DITAPA" (Apdx. 3a). But the diSibios have never made any such contention. They have contended rather that NOW accounts are not covered by the *one paragraph* of the DITAPA that effects the breaking of the pre-existing interest rates on *some kinds* of City Federal accounts. The diSibios have explained and supported that argument in detail (including painstakingly distinguishing the language of the agreements in the *Lawson* cases). They deserve a response.

The memorandum disposition's fifth paragraph states, in its entirety: "The diSibios' remaining contentions are unpersuasive." But in fact, nothing in the memorandum has accurately stated or seriously confronted, much less refuted, a single one of the contentions forcefully argued and extensively supported by the diSibios in some 75 pages of briefing. It is profoundly unfair to deny the diSibios a hearing in this fashion.

Articulating the Anti-diSibio Position. Here is the kind of anti-diSibio argument the Court might make if it were willing to take this case at least somewhat seriously:

1. The RTC lawfully repudiated the City Federal deposit contracts, thereby terminating those contracts in their entirety. The deposits themselves remained owed to the depositors, and the RTC became liable on a breach of contract claim, but the administrative claims process must be used to pursue any such claim in the first instance (and there probably were no allowable damages because of the FIRREA provision

disallowing expectation damages).

2. The RTC offered MNB the opportunity to take over the City Federal deposits provided MNB agreed to offer all City Federal depositors the choice of either (a) being paid their deposits more or less immediately, without any penalty for inadequate notice of withdrawal, or (b) agreeing to a new deposit contract with City Federal on terms permitted by the DITAPA.

3. MNB accepted the RTC's offer, and the RTC approved MNB's acceptance.

4. MNB carried out step #2 in conformance with the terms of the DITAPA.

Under these facts, if anyone claims they were wronged by step 1 or step 2 or step 3, then, no matter who they are or what wrong they allege, their only remedy is through the administrative claims process against the RTC. MNB cannot be liable for wrongs committed at any of those stages of the process; and there is no way for the diSibios to claim that MNB wronged them in step 4, unless they show that MNB violated the terms of the DITAPA.

But if one takes this line of argument, then one is obligated to acknowledge and engage the diSibio counter-arguments. To date, no one, least of all the court of appeal, has done so.

The diSibios' Actual Position. The diSibio response to the foregoing line of argument has been as follows: What really happened is that all of the first three steps set out above actually occurred at the same time, were inextricably intertwined, and jointly authored by the RTC and MNB. Both the RTC and MNB are jointly and severally responsible for the whole package. That package involves steps that were not really authorized by Congress (i.e., by FIRREA) vis-a-vis insured-deposit contracts, steps that, absent an overriding Congressional mandate, are impermissible under California contract law. Even if it is found that the RTC had the authority to do step 1, contract repudiation must be all or nothing; if the RTC could

not parse the deposit contracts, then the whole contract was passed to MNB and MNB accepted it and became bound by it. Even if that is not upheld, the DITAPA's language in fact does not effect parsing/interest-rate-repudiation with regard to the class of deposits owned by the diSibios. So one way or another, the diSibios were wronged by MNB at step 4. These arguments are all set out, and supported by authority, in the diSibio briefs. None of them have been engaged, or even acknowledged, much less refuted, by the Court. It is profoundly unfair to deny the diSibios a hearing in this fashion.

The Post-Briefing Publication of a Relevant New Case. The Court's memorandum disposition, like the MNB brief, gives no serious attention to the DITAPA language highlighted and relied on by the diSibios, to the diSibios' careful distinguishing of the cases relied upon by MNB and the district court (the *Lawson* cases), to the issue of the indivisibility of contracts, to the role of state law in deciding such issues, or to the intersection of the indivisibility issue with the repudiation issue. The diSibio briefs cited extensive case authorities challenging MNB's claim that 1821(e) gave federal receivers the power to ignore the indivisibility of contracts under state law by repudiating some elements of such contracts while transferring other elements. Both MNB and FDIC have essentially ignored all of this in their briefs, simply continuing to insist on their established positions without engaging the diSibios' arguments and authorities. The Court's memorandum follows suit.

There has still been no meaningful challenge to the diSibio assertion that there is nothing in FIRREA that suggests that Congress meant to give receivers the power to abrogate state law as to the indivisibility of contracts. Subsequent to the December 2003 completion of briefing in this case there appeared *Federal Deposit Ins. v. Ernst & Young LLP*, 374 F.3d 579 (7th Cir. 2004). This case supports the diSibio position herein that section 1821(e) of FIRREA does not constitute authorization of the splitting of contracts, and that such

questions are controlled by state law. *Id.* at 583, 584:

> [The parties' briefs debate whether 12 U.S.C. §1821(e) authorizes the repudiation of particular contract provisions.] The district judge thought not, concluding that this subsection allows the repudiation of contracts as a whole but not unwelcome clauses in contracts ... Cerry picking is not allowed by the rejection power in bankruptcy, [citation]; why should it be permitted under §1821(e)? .... The FDIC has not identified any appellate decision holding that §1821(e) may be used to excise words, sentences, or pararaphs from contracts.

The Absence of Congressional Authorization of the FDIC's Interest-Rate-Breaking Policy. Neither MNB nor the FDIC have ever produced a shred of evidence of any Conressional authorization, approval, or awareness of the allegedly "long-standing" FDIC policy. The creation of this policy was the kind of freelance regulatory rule making that has been frowned upon by the courts. *Board of Governors v. Dimensions Fin. Corp.*, 474 U.S. 361, 365 (1986) ("any expansion of agency jurisdiction must come from Congress and not the agency itself"); *Credit Union N.A. v. Board of Governors*, 700 F.Supp. 1152 (D.D.C.1988); *Consumers Union of the U.S. c. Fed. Res. Bd.*, 938 F.2d 266 (DC Cir. 1991). Stripped of any claim of Congressional authorization or approval of such interest-rate-breaking policy and practice, MNB and the FDIC are left with the flawed public policy argument critiqued by the diSibios in their reply brief (the petition for rehearing concludes by repeating that critique).

V. The Ninth Circuit's Response To Petitioners' Request for Rehearing and Oral Argument

The Ninth Circuit's response to petitioners' request for rehearing and oral argument, in its entirety, reads as follows:

ORDER

> The memorandum disposition filed on April 11, 2005, is amended as follows:

Delete the first sentence of the second paragraph, which reads: "The district court properly dismissed the diSibios' claims against City Federal because they failed to exhaust their administrative remedies before the RTC."

In its place, insert the following sentence: "The district court properly dismissed the diSibios' claims against MNB that were based on City Federal's actions; those claims are defaulted because they had to be raised before the RTC before the diSibios could proceed to federal court."

Except for the above amendments, appellants' petition for panel rehearing, with request for oral argument, is denied. Appellants' "Request for Judicial Notice" is also denied.

No further filings shall be accepted in this closed appeal. Apdx. 1a.

While the panel had finally taken notice that the diSibios had never tried to sue City Federal but rather were always suing MNB and MNB only, the panel still failed to recognize that the diSibio claims against MNB were based not on City Federal's pre-1990 misconduct, but on MNB's independent misconduct after taking over the City Federal accounts from the RTC, and continuing throughout the 1990s.

REASONS FOR GRANTING THE PETITION

I. Introduction

In the circumstances herein, GVR is an appropriate exercise of this Court's discretionary certiorari jurisdiction under the broad power conferred on the Court by Congress in 28 U.S.C. §2106. *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 116 S.Ct. 604, 606-08 (1996). GVR is appropriate where it serves the purpose of "flagging a particular issue that [the court below] does not appear to have fully considered." *Id.* at 606. The standard for ordering GVR is a relatively liberal one, because GRV is "premised on matters that we have reason to believe the court below did not fully consider, and because [GVR orders] require only further consideration," rather than

reversal. *Id.* at 607.

The fact that the case law which the party requesting GVR relies on was actually briefed in the court below does not stand in the way of GVR in cases "where the lower court's order shows no sign of having applied the precedents that were briefed." *Id.* at 608; *Netherland v. Tuggle*, 515 U.S. 951, 116 S.Ct. 4 (1995). This is demonstrably such a case.

In the circumstances herein, GVR is not only an appropriate exercise of this court's discretionary jurisdiction, it is also strongly called for in the interests of fundamental fairness, due process of law, and upholding the public reputation of the federal judiciary.

II. If, as Seems Likely, the Explanation for the Ninth Circuit's Enigmatic Decision-Making in this Matter Is an Unspoken Grant of *Chevron* Deference to the FDIC Policy Alleged in the FDIC's Amicus Brief on Appeal, Such Would Make For an Improper Preemption of California Contract Law by Informal FDIC Policy-Making, Contrary To the Mandate of the Case Law of this Court and Other Circuits, and Implicating the Constitutional Rights of All Persons Situated Such as Petitioners.

The section set out, *infra*, from petitioners' opening brief on appeal, explains the hill that respondent should have been required to climb and surmount in order to open the door to their argument that FIRREA gives federal receivers the power to parse deposit contracts, transferring some components of such contracts and extinguishing others. Given that respondent and the FDIC declined that challenge, and the court of appeal passed over the subject without comment, what has happened here is tantamount to the court of appeal giving *Chevron* deference (*Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778 (1984)) to the FDIC policy alleged in the FDIC's amicus brief. And this would mean, in effect, that this FDIC policy preempts state contract law with reference to the contractual relations between successor banks

and the depositors whose accounts such banks take over from failed institutions. That cannot be right. Given that this Court has held that FIERRA does not work a field preemption of state law in this area, and given that FIERRA contains no particularized preemption in this area, FDIC policy-making cannot possibly carry such preemptive force.

This Court's precedents make it clear that there should be no judicial deference whatever to FDIC policy in the circumstances we have here. *Solid Waste Agency v. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675, 683 (2001) (Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority and this concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power); *United States v. Bass*, 404 U.S. 336, 349, 92 S.Ct. 515 (unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87, 114 S.Ct. 2048, 2054 (1994) (courts may not elaborate a "federal common law" to fill gaps in a comprehensive federal statutory scheme such as FIRREA, but must look to state law); *Atherton v. FDIC*, 519 U.S. 213, 218, 117 S.Ct. 666; *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 1662-63 (interpretations in opinion letters, policy statements, manuals, and the like do not warrant *Chevron* deference); *Litton Financial Printing Division v. N.L.R.B.*, 501 U.S. 190, 203, 111 S.Ct. 2215 (1991) (no deference to the administrative agency's interpretation of contract provisions); *Board of Governors v. Dimensions Fin. Corp.*, 474 U.S. 361, 365 (1986) (any expansion of agency jurisdiction must come from Congress, not the agency itself).

The circuits generally agree as to the sharp limits to judicial deference to administrative agency interpretation of statutes and regulations: *1185 Avenue of the Americas Assoc. v. RTC*, 22 F.3d 494, 497 (2nd Cir. 1994); *Wachtel v. Office of Thrift Supervision*, 982 F.2d 581, 585 (D.C.Cir. 1993); *De La Fuente*

v. FDIC, 332 F.3d 1208 (9th Cir. 2003); *First American Bank v. RTC*, 30 F.3d 644 (5th Cir. 1994); *U.S. v. General Battery Corp., Inc.*, 423 F.3d 294, 299-300 (3rd Cir. 2005); *Bankwest, Inc. v. Baker*, 411 F.3d 1289, 1301 (11th Cir. 2005). Certainly FDIC policies which have never been promulgated as regulations, or publicly articulated in any way, cannot qualify for deference; *Wells Fargo Bank, N.A. v. F.D.I.C.*, 310 F,3d 202, 208 (D.C. Cir. 2002).

In *Waterview Management Co. v. F.D.I.C.*, 105 F.3d 696, 697-700 (D.C.Cir. 1997), the court ruled that pre-receivership contracts create valid state law rights, and FIRREA does not provide for any blanket "preemption" of such contracts. State law defines the nature and scope of the pre-receivership contract rights and obligations, and while FIRREA allows the receiver to transfer the failed institution's contract rights and obligations to a successor institution without the consent of other parties to the contract, the pre-receivership contract rights and obligations set by state law continue in being unless the contract is repudiated by the receiver in the manner allowed by FIRREA. See also *Sharpe v. FDIC*, 126 F.3d 1147, 1155-57 (9th Cir. 1997).

The *Waterview Management* court states: "Such state law contracts entered into pre-receivership serve to define the asset held by the failed financial institution. It is merely this asset that can be transferred without consent under federal law, not the asset free from outstanding claims." *Id.* at 699-700. The same applies to liabilities -- the court speaks of "contract rights" in general and emphasizes that the receiver steps into the shoes of the failed institution -- citing *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 114 S.Ct. 2048, 2054 (1994) -- and is *not permitted to "simply 'preempt[]' out of existence pre-receivership contractual obligations."* *Id.* at 701 (emphasis added). And the fact that preexisting "state law contracts" define the assets and liabilities that are held by the failed institution, and that are taken over by the receiver, necessarily means that those "state law contracts" define any assets and

liabilities that (rather than being liquidated or repudiated) are transferred by the receiver to a successor institution.

The state law of contracts at issue is as follows:

The Hill that Respondent and the FDIC Have Been Allowed To Get Away without Climbing. As petitioners argued at length in their opening brief on appeal, there is a large, long-standing body of case law to the effect that contracts such as those between banks and depositors are creatures of, and are to be interpreted according to, state law, including on the issue of divisibility or indivisibility. *In Re Qintex Entertainments, Inc.*, 950 F.2d 1492, 1496-97 (9th Cir. 1991); *In Re Pollock*, 139 B.R.938, 940 (9th Cir.BAP 1992) (whether multiple obligations in an agreement are severable is a question of state law; under California law, "this is a question of the parties' intent based upon the substance and language of the agreement at issue"); *Rey v. Lafferty*, 990 F.2d 1379, 1386 (1st Cir. 1993) (state law determines whether separate contractual documents constitute an integrated agreement); *Monument Square Assoc, v Resolution Trust Corp.* 792 F.Supp. 874, 876-77 (D.Mass 1991) (court looks to state law to determine the divisibility or indivisibility of a contract, and under Maine law the test is whether the parties "assented to all the promises as a single whole, so that there would have been no bargain whatsoever if any promise or set of promises were struck out.").

The test of contract indivisibility appears to be more or less the same in most if not all states. In California, as set forth in *World Sav. & Loan Assn. v. Kurtz Co.*, 183 Cal.App.2d 319, 327 (1960) [citation omitted]:

> A contract is "entire," and not severable, when by its terms, nature, and purpose it contemplates and intends that each and all of its parts, material provisions, and consideration are common each to the other and interdependent.

See also *Filet Menu, Inc. v. CCL&G, Inc.* 79 Cal.App.4th 852, 853 (2000).

In general, it is well established that an executory contract

must be assumed or rejected in its entirety. *Stewart Title v.Old Republic Nat. Title*, 83 F.3d 735, 741 (5th Cir. 1996). In particular, a bankruptcy trustee must assume or reject executory contracts in their entirety, unless the agreement at issue is not really one indivisible contract but a matter that is divisible into separate agreements. *In re Cutters, Inc.*, 104 B.R. 886, 888 (Bankr.M.D.Tenn. 1989). A receiver or trustee "may not blow hot or cold. If he accepts the contract he accepts it *cum onere.* If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other." *In Re Italian Cook Oil,* 190 F.2d 994, 997 (3d Cir. 1951) accord *National Labor Relations* Board *v. Bildisco and Bildisco,* 465 U.S. 513, 531-32, 104 S.Ct. 1188, 1198-99 (1984); *In Re Bridgeport Jai Alai, Inc*, 215 B.R. 651, 657 (Bkrtcy.D.Conn. 1997).

In light of the foregoing, particularly noteworthy for present purposes is *Centennial Sav. Bank FSB v. U.S.,* 887 F.2d 595, 605, 608 (5th Cir. 1989), wherein the court found that the interest rate term and the early-withdrawal-penalty term of a certificate of deposit were integral parts of the CD obligation, not severable sub-agreements or sub-obligations.

The foregoing well-established body of law is consistent only with the view that a receiver must either repudiate/liquidate a preexisting deposit contract of the failed institution in its entirety or transfer that contract in its entirety to a successor institution. There is nothing in FIRREA to suggest otherwise. *Federal Deposit Ins. Corp. v. S.A.S. Associates*, 44 F.Supp.2d 781, 785 (E.D. Va. 1999) (nothing in the language or legislative history of FIRREA indicates Congressional intent to give FDIC discretion to modify pre-receivership contracts at will or the right to enforce only those provisions of such contracts that FDIC found palatable); affirmed by *WRH Mortg. Inv. v. S.A.S. Associates*, 214 F.3d 528, 534 (4th Cir. 2000) (unilateral breach of any part of an integrated contract constitutes breach of indivisible whole); *Hackel v. F.D.I.C.*, 858 F. Supp. 289, 291-92 (D.Mass. 1994) (multiple contractual documents were all negotiated during

same time period and executed on same day between plaintiff and bank that later failed; under Massachusetts law, the different obligations embodied in the documents were "integral parts of a single, indivisible transaction" and the FDIC, as receiver for the failed bank could not, under FIRREA, repudiate the obligations of one document without rendering all of the obligations of all of the documents null and void).

Under the foregoing case law, the deposit contract between City Federal Savings and Loan and the diSibios was an entire, single indivisible contract, a single indivisible obligation. The earning of interest, and the manner in which interest is calculated, are fundamental and essential to the nature of an interest-bearing deposit account.[2] The contract between City Federal and the diSibios could not have come into existence without an interest rate term. The interest rate term was essential to the entire contract and not severable. If such deposit account contracts were to be transferred at all, it would have to be *en grosse*. In other words, as a matter of California law, the May 1990 transfer of deposit accounts from City Federal to MNB was *en grosse*.(As referenced, *supra*, the diSibio petition for rehearing added new authority, *Federal Deposit Ins. v. Ernst & Young*, 374 F.3d 579 (7th Cir. 2004).

How can all of the foregoing simply be ignored, go entirely unanswered? Judge Kozinski of the Ninth Circuit has rebuked his colleagues for issuing a memorandum disposition ignoring the applicability to the case before them of this Court's decision in *Solid Waste Agency v. Army Corps of Engineers*, 531 U.S. 159, 121 S.Ct. 675 (2001). Judge Kozinski writes, "Is *Solid Waste* chopped liver? One would certainly think so from reading [the majority's memorandum disposition]." *John v. U.S.*, 247 F.3d 1032, 1046 (9th Cir. 2001), Kozinski, J., dissenting, joined by judges O'Scannlain and Rymer. The

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In its September 2002 ruling on MNB's motion for judgment on the pleadings, the district court affirmed that interest due is as much a part of a deposit as is original principal. Order, Apdx. 24a, n15.

diSibios ask, are the cases they have relied on herein chopped liver? If all these authorities are to be turned into chopped liver, the Ninth Circuit should at least be required to do the slicing and dicing on the record.

III. If the Explanation for the Ninth Circuit's Enigmatic Decision-Making in this Matter Is Inattention To The Record and Failure To Give Petitioner's Briefs a Serious Reading and Their Arguments a Fair Hearing, Then the Panel So Seriously Departed from the Proper Course of Judicial Proceedings as To Deprive Petitioners of Due Process of Law and To Call for this Court's Exercise of Supervisory Power, at Least To the Extent of GVR.

The Ninth Circuit decided the case without allowing oral argument. The panel's one-and-a-half page memorandum disposition both attributes to the diSibios positions they have never taken, and completely overlooks key factual and legal arguments, and supporting legal authorities, that the diSibios did set out in their opening and reply briefs. Under FRAP 40(a)(2), a party may petition for rehearing where it appears clear that the court, in its decision of the matter, has overlooked or misapprehended important facts or points of law. Here we have an instance of such judicial slippage and misapprehension so extreme as to be difficult to explain. Comparing the positions that the diSibios take in their briefs and the positions attributed to them in the court's memorandum, it is impossible to believe that the diSibios' briefs have been given a serious reading. Given the panel's negative response to the diSibio petition for rehearing and the panel's continuing denial of oral argument (where the diSibios might have ensured that their real arguments were actually heard, confronted and engaged, at least to some degree), this means that the diSibios have yet to be

given a meaningful hearing.[3] They petition this court to remedy this injustice by GVR.

The Ninth Circuit held onto this case for 16 months, and then denied oral argument and issued a one-and-a-half page memorandum disposition consisting of nothing but conclusory boilerplate devoid of principled argument, leaving appellants feeling that they have been denied an honest hearing and summarily dismissed, in effect punished for having dared to bring the appeal. This is disheartening to say the least, and is the kind of result that undermines the public reputation of the judiciary and the entire legal system. The diSibios implored the Ninth Circuit to reconsider its position, and to give them either an opportunity for oral argument or a principled explanation of how and why their arguments are wrong, so as to dispel the impression that the Court was engaging in purely result-oriented jurisprudence, failing to make principled arguments refuting the diSibios because in fact there were none to be made. The Ninth Circuit panel ignored the diSibios' plea, just as it had ignored their arguments and authorities. This situation calls out for the exercise of this Court's supervisory power, at least to the extent of GRV.

CONCLUSION

The instant petition for certiorari should be granted, at least in the form of GVR.

Respectfully submitted.

Lewis diSibio
In pro se

Mary diSibio
In pro se

December 2005

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This Court has opined that in some circumstances, denial of oral argument might constitute deprivation of due process. *Federal Communications Com'n v. WJR, the Goodwill Sta.*, 69 S.Ct. 1097, 1104 (1949).

APPENDIX A

No. 03-15722

United States Court of Appeals for the Ninth Circuit

LEWIS DISIBIO, suing individually and on behalf of the general public; MARY DISIBIO, suing individually and on behalf of the general public,
Plaintiffs - Appellants

v.

MISSION NATIONAL BANK, a National Banking Association, sued separately and as successor in interest to City Federal Savings and Loan Association,
Defendant - Appellee

September 7, 2005

Before: B. FLETCHER, TROTT, and SILVERMAN, Circuit Judges.

ORDER

The memorandum disposition filed on April 11, 2005, is amended as follows:

Delete the first sentence of the second paragraph, which reads: "The district court properly dismissed the diSibios' claims against City Federal because they failed to exhaust their administrative remedies before the RTC."

In its place, insert the following sentence: "The district court properly dismissed the diSibios' claims against MNB that were based on City Federal's actions; those claims are defaulted because they had to be raised before the RTC before the diSibios could proceed to federal court."

Except for the above amendments, appellants' petition for panel rehearing, with request for oral argument, is denied. Appellants' "Request for Judicial Notice" is also denied.

No further filings shall be accepted in this closed appeal.

APPENDIX B

No. 03-15722

United States Court of Appeals for the Ninth Circuit

LEWIS DISIBIO, suing individually and on behalf of the general public; et al., *Plaintiffs - Appellants*

v.

MISSION NATIONAL BANK, a National Banking Association, sued separately and as successor in interest to City Federal Savings and Loan Association, *Defendant - Appellee*

DC # CV-01-03668-PJH

Entered April 11, 2005

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding

Submitted March 23, 2005**

Before: B. FLETCHER, TROTT, and SILVERMAN, Circuit Judges.

Lewis and Mary diSibio appeal pro se the district court's summary judgment for Mission National Bank ("MNB") in their action alleging federal and state law violations that occurred during the Resolution Trust Corporation's ("RTC") placement of City Federal Savings and Loan Association

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

("City Federal"), into receivership with MNB. We review de novo the district court's summary judgment, 45 F. 3d 1278, 1282 (9th Cir. 1994), and we affirm, *Intercontinental Travel Mktg., Inc. v. FDIC,*

The district court properly dismissed the diSibio's claims against City Federal because they failed to exhaust their administrative remedies before the FDIC); *see also Resolution Trust Corp. v. First Am. Bank,* 155 F.3d 1126, 1127 (9th Cir. 1998) (stating that the RTC was the FDIC's predecessor).

The district court properly held that the terms of the receivership contract between RTC and MNB – the Deposit Insurance Transfer and Asset Purchase Agreement ("DITAPA") – clearly and unambiguously provided that MNB would assume only certain, limited obligations. *See United States v. King Features Entertainment, Inc.,* 843 F.2d 394, 398 (9th Cir. 1988). Contrary to the diSibios' contention, the district court properly held that the DITAPA empowered RTC to effect lower interest rates on deposit accounts after MNB assumed City Federal's administration, because the higher rates were burdensome and the repudiation of those interest rates would promote the orderly administration of the institution's affairs. *See* 12 U.S.C. §§ 1821(E)(1)(B) and (C); *Battista v. FDIC,* 195 F.3d 1113, 1116 (9th Cir. 1999).

We reject the diSibios' contention that the money deposited into their Negotiable Order of Withdrawal (NOW) account was not subject to the DITAPA.

The remaining contentions are unpersuasive.

We deny the diSibios' motion to take judicial notice of documents that were not admitted before the district court. *See Lowry v. Barnhart,* 329 F.3d 1019, 1024-25 (9th Cir. 2003).

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

LEWIS DISIBIO, et al.,
Plaintiffs,

v. No. C-01-3668 PJH

MISSION NATIONAL BANK, **JUDGMENT**
Defendant

_____/

This action came on for hearing before the court and the issues having been duly heard and the court having granted defendant's motion for summary judgment,

it is Ordered and Adjudged

that the complaint is dismissed with prejudice.

IT IS SO ORDERED.

Dated: March 25, 2003

/S/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

APPENDIX D
NOT FOR CITATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LEWIS DISIBIO, et al.,
Plaintiffs,
v. No. C-01-3668 PJH

MISSION NATIONAL BANK, **ORDER**
Defendant
_____/

Defendant' motion for summary judgment and motion for sanctions came on for hearing on March 19, 2003 before this court, the Honorable Phyllis J. Hamilton presiding. Plaintiffs appeared through William Barnes, specially appearing on behalf of plaintiffs' counsel Robert Gonzales, and defendant appeared through its counsel William Levinthal.[1] Having read the papers, including plaintiffs' surreply brief, and carefully considered the relevant legal authority, the court hereby rules as follows for the reasons stated at the hearing.

A. Motion for Summary Judgment

1. Background

In 1984 plaintiffs Lewis and Mary diSibio opened a NOW checking account with the now-defunct City Federal Bank, which allegedly guaranteed an interest rate of 5.25% for balances up to $2,400 and 8.5% for balances above that amount.[2] Complaint ¶10. They have now sued because City

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The court is informed that Mr. Gonzales was unable to attend the hearing for medical reasons.

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A NOW account is defined as a "negotiable order of withdrawal" account, which is an interest-bearing account against which checks can be written, with certain restrictions on when withdrawals can be made. NOW accounts are defined at 12

Federal in November 1986 subsequently changed their interest rate and minimum balance requirement. Id. ¶11. They further complain that after defendant Mission National Bank ("MNB") took over City Federal in 1991, MNB further lowered the interest rate. Id. ¶15

City Federal became insolvent in mid-1989 due to the S&L crisis, and was placed into conservatorship by the Federal Home Loan Bank Board. Bank Request for Judicial Notice ("RJN") Exh. C. On May 18, 1990, the Resolution Trust Corporation ("RTC") was appointed the receiver for City Federal.[3] Id. Exh. A.

RTC then entered into a Deposit Insurance Transfer and Asset Purchase Agreement ("DITAPA") with defendant Mission National Bank ("MNB"), which transferred City Federal's insured open bank accounts to MNB.[4] The DITAPA specifically stated that 14 days after the transfer of the accounts, and 7 days after giving notice to former City Federal depositors, MNB could lower the interest rates originally offered by City Federal. DITAPA at §6.2. While MNB has no record of such a letter being sent to the diSibios, they have attached a representative notice letter sent around that time that they located in their files, and attest that they sent these letters to all City Federal depositors when MNB took over their accounts, and public notices published in local newspapers. See, e.g., Aiello Decl. ¶¶3-5, Exh. A (letter dated May 25, 1990); Faye Decl. Exh. D (public notice); Exh. E (RTC press

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U.S.C. §1832(a).

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The RTC was created by the Financial Institutions Reform Recovery and Enforcement Act of 1989 ("FIRREA") as a parallel institution to the FDIC for savings and loans institutions when it became apparent that the Fedeeral Savings and Loans Insurance Corporation ("FSLIC") would be unable to meet its insurance obligations for those institutions.

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The DITAPA can be found at Wessling Decl. Exh. A.

release).

2. Legal Standard

a. FIRREA and the RTC

Under FIRREA, the RTC was given certain powers when it took over a failed financial institution, including the right to repudiate the failed bank's obligations that the RTC in its discretion deemed burdensome or unlikely to promote the orderly administration of the failed bank's affairs.[5] 12 U.S.C.§1821(e)(1); see also, e.g., Battista v. FDIC, 195 F.3D 1113, 1116 (9th Cir. 1999). The RTC was also permitted to "transfer any asset or liability of the institution in default ... without any approval, assignment, or consent with respect to such transfer." 12 U.S.C. §1821(d)(2)(G)(ii).

When the RTC takes over a failed institution, it only takes responsibility for:

> the balance of principal and interest unconditionally credited to the deposit account as of the date of default of the insured depository institution, plus the ascertainable amount of interest to that date, accrued at the contract rate ... which the insured depository institution in default would have paid of the deposit had matured on that date and the insured depository institution had not failed.

12 C.F.R. §330.3(i)(1). Any additional future interest promised on the account by the failed institution is thus no longer in effect once the RTC is appointed to receivership.

b. Exhaustion

The RTC assumes all rights and obligations of a failed financial institution once it is appointed in receivership. Sharpe v. FDIC, 126 F.3d 1147, 1152 (9th Cir 1997) (citations omitted). Therefore, the RTC is charged with the responsibility of

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In 1995, the FDIC succeeded to RTC's obligations. 12 U.S.C. §1441a(M)(1).

resolving all claims and potential claims against the failed financial institution. 12 U.S.C. §1821(d)(3); Intercontinental Travel Mktg., Inc. v. FDIC, 45 F.3d 1278, 1282 (9th Cir. 1994). Parties must administratively exhaust their claims before the RTC before proceeding to the district court. 12 U.S.C. §1821(d)(13)(D); Intercontinental Travel, 45 F.3d at 1282 ("section 1821(d)(13)(D) strips all courts of jurisdiction over claims made outside the administrative procedures of section 1821.") (citations omitted).

Upon taking over the failed financial institution, the RTC was required to publish notices to creditors setting forth a date by which all claims must be brought. The date could not be less than 90 days from the date of publication, and the notice was to be published three times. 12 U.S.C. §1821(d)(3)(B). Any claims brought after this period were to be disallowed. 12 U.S.C. §(1821(d)(5)(C).

The RTC was then given 180 days to process the claim. After the RTC issued a decision on the claim, the parties then had 60 days to seek administrative review of the decision by a district court. 12 U.S.C. §1821(d)(6). The district courts are not permitted to review any other matters concerning assets transferred to the RTC. 12 U.S.C. §1821(d)(13)(D).

3. Motion to Amend

MNB first requests leave to amend its answer to plead affirmative defenses based on FIRREA and the DITAPA. Motions to amend are to be freely granted, Fed. R. Civ. P. 15(a), absent a showing of undue delay, bad faith, utility of the proposed amendment, or prejudice to the opposing party. Moore v. Kayport Package Express, 885 F.2d 531, 538 (9th Cir. 1989). Here, the diSibios have not demonstrated that any factors against amendment apply. The amendment is neither

futile nor made in bad faith or with a dilatory motive.[6] Furthermore, MNB's FIRREA defense, as a purely legal issue, has been available from the commencement of the case, and thus the diSibios will suffer no prejudice by its addition to the pleadings now.[7] Wyshak v. City National Bank, 607 F.2d 824, 826 (9th Cir. 1979) (permitting the late addition of statute of limitations defense).

Therefore, MNB may amend its pleadings, even at the summary judgment stage, to add their new FIRREA and DITAPA defenses. Camarillo v. McCarthy, 998 F.2d 638, 639 (9th Cir. 1993) (affirmative defense may be raised for the first time at summary judgment absent showing of prejudice) (citation omitted).

4. Exhaustion

The diSibios first claim that City Federal improperly lowered the interest rate and minimum balance requirements for their account in November 1986. Complaint ¶11. All claims against City Federal were assumed by RTC when they placed City Federal into receivership. Sharpe, 126 F.3d at 1152. This includes any change in interest rates made by City Federal before they became insolvent. The diSibios were required to raise those claims before the RTC before proceeding to district court. 12 U.S.C. §1821(d). Since the diSibios have presented no evidence that they brought any claims before the RTC, all claims based on City Federal's actions must be dismissed for lack of exhaustion. Intercontinental Travel, 45 F.3d at 1282.

5. DITAPA

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While MNB has delayed in raising the issue, delay alone does not form a sufficient basis for denying a request to amend. See, e.g., Bowles v. Reade, 198 F.3d 752, 758 (9th Cir. 1999) (citation omitted).

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The court does not find that the defendants are estopped from raising this defense because they failed to list it in their initial case management conference.

The diSibios next claim that MNB has failed to honor the interest rates originally promised by City Federal. Complaint ¶15.

i. DITAPA interpretation

The diSibios claim that the DITAPA did not empower MNB to change the interest rate on NOW accounts. They base this argument on the fact that the second sentence of DITAPA §2.2 states that "the Agent [MNB] shall pay interest on all time savings deposits of [City Federal] transferred ... at a rate no less that the then current passbook rate of interest paid by the Agent." (Emphasis added). The diSibios argue that only CD accounts may be considered "time savings deposits," and therefore MNB may not alter City Federal pre-existing interest rates on NOW accounts.[8]

On an issue of contract interpretation, "[s]ummary judgment is appropriate when the contract terms are clear and unambiguous, even if the parties disagree as to their meaning." United States v. King Features Entertainment, Inc., 843 F.2d 394, 398 (9th Cir. 1988). In interpreting such a contract, the court must "examine the contract's language, the parties' clear intentions as expressed in the contract, and the circumstances under which the parties contracted," inferring intent solely form the written provisions of the contract. Kassbaum v. Steppenwolf Productions, Inc., 236 F.3d 487, 491 (9th Cir. 2000), cert. denied, 534 U.S. 815 (2001), citing AIU Insurance Co. v. Superior Court, 51 Cal.3d 807, 821 (1990).

The diSibios' interpretation of "time savings account" as exempting NOW accounts from these provisions cannot be supported. The term "time saving deposit" is not defined in any

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The diSibios also argue in their surreply that DITAPA §2.5 requires ratification of the account transfer from City Federal to MNB. But by leaving their funds with MNB, the diSibios ratified the account transfer. See, e.g.. Aiello Decl. Exh. A (notice to depositors informing them that they would be transferred to MNB unless they withdrew their funds).

of the relevant statutes, and, contrary to the diSibios' claims, it does not appear to be a financial term of art for a CD account. See 12 C.F.R. §204.2(c) (CD account instead defined as "time deposit").

Thus, the question then becomes whether the term "time saving deposit" when read in the context of the whole contract, can be interpreted to mean deposits other than NOW accounts. This interpretation is not plausible as a matter of law. Under DITAPA §2.1, MNB would agree to accept from RTC all of City Federal's original rates for at least 14 days. DITAPA §2.2 (first sentence). Then, pursuant to DITAPA §6.2, MNB could then lower the interest rates on all of those deposit accounts, upon seven days' public notice to the depositors.

Read in this context, it is clear from the written provisions of the contract that the DITAPA was intended to permit MNB to lower the interest rates of all transferred interest-bearing accounts, and not to exempt NOW accounts from interest-rate adjustment.

ii. Notice

MNB then promptly notified its new City Federal clients of the account transfers and subsequent interest rate modifications in a letter sent pursuant to DITAPA §6.2. Aiello Decl. Exh. A ("Your account will earn interest at the same rate paid by City Federal Saving and Loan up to through and including June 1, 1990. Thereafter, the interest you earn on your account will be adjusted to reflect our existing rates.")[9] Similar language by the new financial institution has been considered sufficient notice

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The diSibios do not raise this point, but MNB admits that it does not have proof that is sent a notice letter to the diSibios. MNB does submit a declaration from its Senior Vice President attesting that he sent such notices to all former City Federal accountholders, and that they published notices at the main branch and in a general newspaper concerning MN's right to lower interest rates going forward. Aiello Decl. ¶¶3-5; Faye Decl. Exhs. C-E. (copies of published public notices). This is sufficient to show that MNB complied with DITAPA §6.2.

that the receiver has repudiated the existing contract rates. Lawson v. Resolution Trust Corp., 20 F.3d 786, 788 (7th Cir. 1994) (same plaintiffs as in Lawson v. FDIC; new bank no longer bound by failed financial institution's promised interest rates due to RTC's repudiation of those terms.

c) RTC

When RTC took over City Federal, they were permitted to repudiate the interest rates that City Federal promised to its depositors if they found those rates to be burdensome and not in City Federal's best interest. 12 U.S.C. §1821(e)(1). RTC and MNB may thus be deemed to have done that here through the DITAPA. Cf, Lawson v. FDIC, 3 F.3D 11, 15)1st Cir. 1993) (FDIC as receiver permitted to repudiate a failed institution's promised interest rate on CDs before transferring account to another financial institution).

Thus, MNB never assumed under the DITAPA any of City Federal's obligation to pay the higher interest rates requested by the diSibios, and therefore MNB cannot be bound to the City Federal interest rates. Lawson v. FDIC, 3 F.3d at 16 (holding that the new bank "did not assume any obligations with respect to the Lawson's deposit accounts beyond those set forth in the purchase and assumption agreement," and affirming dismissal of case against the new bank and FDIC on summary judgment); Lawson v. RTC, 20 F.3d at 788 ("The Lawsons offer no reason, and we know of none, why [the new bank] could not limit the extent of [the failed institution's] liabilities it assumed when it agreed with Resolution to acquire certain of [the failed institution's] assets and assume certain of its liabilities," and affirming dismissal against new bank and RTC under Rule 12)."[10] Summary judgment on the claims against MNB is

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The diSibios did not name RTC as a party to this action, but even if they had, RTC's liability for repudiation of City Federal's contracts is limited to "actual direct compensatory damages, and determined as of the date of the appointment of the ... receiver." 12 U.S.C. §1821(d)(3)(A). The RTC is expressly exempted from liability

appropriate.

B. Motion for Sanctions

1. Background

On September 23, 2002, the diSibios filed a motion to supplement their complaint to add allegations concerning the closure of their savings account by defendant Mission National Bank ("MNB") in May 2002. The court denied that motion on October 17, 2001. Nonetheless, on November 6, 2002, the diSibios moved for summary judgment on the issue of the closing of their savings account, even though the court had denied their request to add the issue to the case.

On November 20, 2002, MNB sent a letter to the diSibios warning them that they believed the summary judgment motion to be frivolous, and that if it was not withdrawn by November 22, MNB would move for sanctions under Fe. R. Civ. P. 11. The diSibios did not withdraw their motion by the 22nd.

On December 4, 2002, MNB served, but did not file its sanctions motion on the diSibios.[11] On the same day, the court denied the motion for summary judgment. 27 days later, on December 31, 2002, MNB filed the sanctions motion with the court.

1. Analysis

a. Rule 11

Pursuant to Fed. R. Civ. P. 11(b), an attorney is required to

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for lost profits damages based on its repudiation. 12 U.S.C. 12 U.S.C. §1821(d)(3)(B). This has been held to exempt a receiver from any responsibility to compensate a depositor for any difference in interest payments. Lawson v. FDIC, 3 F.3D at 15-16 (explaining that difference in interest rates constitutes lost profits damages and is therefore unavailable under 12 U.S.C. §1821(d)(3)(B).

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See Fed. R. Civ. P. 11(c)(1)(A) (requiring at least 21 days "safe harbor" between service and filing of Rule 11 motion).

certify that all filings with the court "are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." A pleading is warranted by existing law if a "plausible, good faith argument can be made by a competent attorney" in support of its position. Zaldivar v. City of Los Angeles, 78 F.2d 823m 831 (9th Cir. 1986), abrogated on other grounds, Cooter Gell v. Hartmarx Corp., 496 U.S. 384 (1990); see also, e.g., Paciulan v. George, 38 F.Supp.2d 1128, 1144 (N.D. Cal. 1999). The motion's reasonableness is evaluated on an objective standard. See, e.g., Smith v. Ricks, 31 F.3d 1478, 1488 (9th Cir. 1994) ("counsel can no longer avoid the sting of Rule 11 sanctions by operating under the guise of a pure heart and empty head") (citation omitted).

To bring a Rule 11 motion, the party seeking sanctions must serve the motion at least 21 days before filing it with the court, to allow the other party the opportunity to withdraw the motion and thus avoid sanctions. Failure to do so will bar any sanctions award against the offending party. Barber v. Miller, 146 F.3d 707, 710-11 (9th Cir. 1998). Here, the diSibios were not given that opportunity, because the court had already disposed of the underlying motion for summary judgment. The purpose of the safe harbor period is to give the diSibios a full opportunity to evaluated their motion and withdraw it, if necessary. Barber, 146 F.3d at 710. Since the motion was already decided by the time the motion for sanctions was served, the diSibios had no chance to withdraw or correct the motion, even though 21 days elapsed between the service of the motion and its filing. See Moore's Federal Procedure §11.22[1][c] (Rule 11 motions must be served at least a full 21 days before the court ... resolves the offending contention") Even though the diSibios' underlying motion for summary judgment was arguably frivolous, the court is required to deny MNB's motion for Rule 11 sanctions in this circumstance.

b. 28 U.S.C. §1927 and inherent Power Sanctions

MNB also requests sanctions under 28 U.S.C. §1927 and the court's inherent powers. Sanctions under either of those provisions requires a showing of subjective bad faith on the part of the attorney. See Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc., 210 F.3d 1112, 1118 (9th Cir. 2000) (§1927; "knowing or reckless conduct meets this standard") (citations omitted); Chambers v. NASCO, 501 U.S. 32, 43 (1991) (inherent powers). Here, although the motion was without merit, there has been no showing that the diSibios' attorney acted with the requisite bad faith intent. Sanctions under either of these doctrines are thus unwarranted.

Defendant's motion for summary judgment is GRANTED, and defendants motion for sanctions is DENIED.

This order fully adjudicates the matter listed at nos. 60 and 77 on the clerk's docket for this case, and all other pending matters. The trial date of May 12, 2003 is VACATED. The clerk is ordered to close the file.

IT IS SO ORDERED.

Dated: March 25, 2003

/S/ Phyllis J. Hamilton
Phyllis J. Hamilton
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LEWIS DISIBIO, et al.,
Plaintiffs

v.

MISSION NATIONAL BANK,
Defendant

No. C-01-3668 PJH
ORDER[12]

(filed Sept.13, (2002)

Defendant's motion for judgment on the pleadings came on for hearing on April 10, 2002, before this court, the Honorable Phyllis J. Hamilton presiding. Defendants appeared by their counsel Bruce W. Leppla, and plaintiffs appeared by their counsel David L. Olson. At the hearing, the court requested additional briefing, which has now been received and reviewed. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby rules as follows for the reasons stated at the hearing.

BACKGROUND

This case is brought by two consumers alleging that defendant bank breached the terms of an agreement entered into when the consumers opened money market checking accounts. Before the court is defendant's motion for judgment on the pleading which alleges that most of the complaint is barred by the statute of limitations. On January 3, 1984, plaintiffs opened an interest-bearing money market checking account at the Berkeley branch of City Federal Savings and Loan Association. Complaint, ¶7. Plaintiffs allege that in the course of opening the account they signed an "agreement card." Id. at ¶8. That card acknowledged that the account was subject to rules established by the bank and acknowledged receipt of those rules. Id. at ¶8.

12

This order is not appropriate for citation pursuant to Civil L.R. 7-13.

However, plaintiffs allege they never received the rules. Id. at ¶9. Plaintiffs opened the account with a $2,500 deposit, allege there was no reference made to minimum account balances, and allege that interest rates were displayed on a "rate board" inside the bank. Id. Plaintiffs allege they began receiving account statement, "the first of which verified the advertised rates of interest" and which did not reference any service charges. Id.[13]

Plaintiffs allege that when the account was opened, they understood that the interest would vary based upon the average daily balance – 5.25% for balances between $0 and $2,499 and 8.5% for balances that were greater. Id. at ¶10. Plaintiffs allege that over time, City Federal incrementally reduced the maximum threshold rate (8.5%) to a low of 5.25% in November of 1986. Id. at ¶11. Through July of 1988, plaintiffs allege that the maximum threshold balance was reduced from $2,499 to $99.99. Id. at 12. In August 1988, plaintiffs allege that City Federal replaced the two-tier system with a four-tier system that put a 5% rate on balances up to $3,499 and a 5.85% rate on balances greater than $50,000. Id. at ¶11. Plaintiffs allege that City Federal did not have the authority to make any of these changes.

On May 18, 1990, plaintiffs allege that defendant Mission National Bank succeeded to City Federal's interest in plaintiffs' account. Id. at ¶15. Plaintiffs allege that Mission National then implemented an "arbitrary value, single-rate, system." Id. The rate was initially set at 5.6% and plaintiffs allege that rate was subsequently lowered without regard to the account balance. Id.

Beginning on August 23, 1990, plaintiffs allege that the statements, rather than referring to rates, referred to "interest credited." Id. at ¶16. Plaintiffs also allege that defendant

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13

A copy of an account statement dated January 31, 1984, attached as exhibit B to the complaint, includes the words "Interest Rate Variable." In addition, there is a column labeled "Service Charge." The exhibit further states that the "Approximate average interest rate for this statement period 8.500%." the listed service charge is ".00."

charged plaintiffs' account number and that, further, yields on the account declined to 1.26% as of April 1994 and stayed there through 1996. Id. ¶17. Plaintiffs allege that the account began to be referred to as "Mission Interest Checking." Id. ¶18.

For three months in 1997, plaintiffs allege they were assessed a $10 service charge. Id. ¶18. In early 2001, plaintiffs were again assessed a $10 service charge. Defendant informed plaintiffs that this was due to a balance below $1,000 and referred plaintiffs to "a new checking account pamphlet." Id. at ¶20. On March 1, 2001, plaintiffs received a 1999 pamphlet, which referenced the service charge for balances under $1,000. Id. at ¶21.

On April 13, 2001, plaintiffs requested copies of the original deposit contracts, applicable rules, etc. Plaintiffs allege they have never been provided such documents. Id. at ¶¶22-24. In sum, plaintiffs allege that "Defendant Bank is in violation of its deposit account contract, attempting to substitute a new account in place of an existing account." Id. at ¶32.

Plaintiffs filed suit against Mission on September 28, 2001, alleging six claims for relief. The first is brought under the Truth in Savings Act ("TISA"). TISA provides that "[n]o depository institution ... shall make any advertisement, announcement, or solicitation relating to a deposit account, that is inaccurate or misleading, or misrepresents the deposit accounts." 12 U.S.C. §4301(e). Plaintiffs allege that defendant violated this provision by: calling the account "Mission Interest Checking;" changing the number of the account; claiming that the 1999 pamphlet governs plaintiffs' account; advertising (in the 1999 pamphlet) that the checking account will earn money market rates when defendant is actually paying higher rates on its money market accounts; claiming plaintiff must maintain a minimum balance to avoid a service charge fee; and requesting that plaintiffs sign a new signature card. Complaint, at ¶37. Plaintiffs also allege that defendant has failed to maintain a schedule of fees, charges, interest rates" applicable to accounts

as required by TISA. Id. at ¶¶41-42.

The second claim is entitled "breach of contract" and alleges there was a binding contract between plaintiffs and defendant to apply the original interest rate schedule to the account and to not assess service charges. Id. at ¶49. The third claim for relief is entitled " breach of the covenant of good faith and fair dealing" and alleges a breach by failing to provide plaintiffs with information about their account, misleading plaintiffs as to the terms of the contract betweeen them, and purporting to unilaterally modify the contract. Id. at ¶57.

The fourth claim for relief is for violation of Business and Professions Code section 17200 and is brought on behalf of plaintiffs and the general public. Plaintiffs allege breach of contract and violations of TISA as the predicate underlying acts. Complaint, at ¶63.

The fifth claim for relief is for violation of California's Consumer Legal Remedies Act. Plaintiff Lewis diSibio alleges that he is a senior citizen who has "suffered substantial emotional and economic damages resulting from defendant's conduct." Id. ¶¶69-70.

The sixth claim for relief has no label. It alleges that defendant has concealed the fact that there never were "rules" promulgated to govern the original account. Id. at ¶79. It appears that this is an intentional misrepresentation claim.

Defendant now moves for summary judgment on the pleadings base upon various statute of limitations defenses.

DISCUSSION

A. Legal Standard.

"After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be

resolved and that it is entitled to judgment as a matter of law." v. Richard Feiner and Co., 896 F.2d 1542, 1550 (1990). "The allegations of the non-moving party must be accepted as true, while the allegations of the moving party which have been denied are assumed to be false." Hal Roach Studios, 896 F.2d at 1550. While it appears that courts often grant partial judgments on the pleadings, it is clear that "[p]artial judgment on the pleadings is not possible in federal pleading unless it disposes entirely of one or more counts of the complaint." In re Amica, Inc. 130 B.R. 792, 796 (Bankr.N.D.Ill.-1991).

B. The TISA Claim.

Both parties agree that actions under the TISA must be brought within 1 year of the act that gives rise to the claim. 12 U.S.C. §4310(e). Plaintiffs have made it very clear to the court in their briefing (albeit not in the complaint) that they are only alleging that acts which occurred in the year prior to the filing of the complaint are violations of TISA for which they can recover. Opposition brief at 12 ("the gravament [sic] of Plaintiff's TISA claim is not the failure seventeen years ago to pay the contracted for interest rate, but rather, Defendant Bank's failure in the year preceding the filing of the complaint to accurately represent the 'true terns' of the deposit agreement (...)."). Plaintiffs specifically refer to paragraph 45 of the complaint, which states:

> Plaintiffs received statements concerning their account during the past year. These statements recited interest payments and annual percentage yields that were lower than the interest payments and annual percentage yields to which Plaintiffs were entitled, and beginning in December 2000, have indicated that the Bank has been assessing a $10.00 service charge whenever the account balance fell below $1,000.00.

Defendant responds that even if alleged TISA violations occurred in the year leading up to the filing of the complaint, because plaintiffs had knowledge of those claims earlier, and

thus their claims accrued at an earlier date, they are still barred by the statute of limitations. In essence, defendant argues that plaintiffs cannot allege a continuing violation under TISA.

The parties do not cite, and the court has not found, case law discussing whether continuing violations may be alleged under TISA to defeat the statute of limitations. However, the court notes that the statutory language establishing the limitation period under TISA is effectively identical to the language establishing the limitation period for actions brought under the Truth in Lending Act ("TILA"). Compare 12 U.S.C. §4310(e) ("Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year after the date of the occurrence of the violation involved."), with 15 U.S.C. §1640(e) ("Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation."). Given this similarity in language, this court will follow the Third Circuit's lead in looking to TILA as a useful guide in construing TISA. Schnall v. Amboy Nat. Bank, 279 F.3d 205, 218 (3d Cir. 2002) ("Given the similar purposes of TISA and TILA and the fairly substantial body of TILA case law that existed at the time Congress enacted TISA in 1991, we presume that Congress was aware of the judicial interpretation of TILA and that in borrowing language from TILA, Congress intended that language to have the same meaning that courts had given TILA."). The Ninth Circuit has held that nondisclosure of required terms under TILA is not a continuing violation. Katz v. Bank of California, 640 F.2d 1024, 1025 (9th Cir. 1981) ("Katz' alternative argument, that nondisclosure was a 'continuing' violation, must also be rejected. Even if a continuing violation theory is viable, the Bank's actual disclosure of the previously undisclosed term commenced the running of the period of limitations."); see also Cordova v. Banco Bilbao Vizcaya de Puerto Rico, 73 F.Supp.2d 133, 136 (D.P.R.) ("nondisclosure is not a continuing violation.")

As noted above, plaintiffs' TISA claim alleges that the statements received by plaintiffs indicated interest payments and percentage yields lower than that to which the plaintiffs were entitled. Complaint, ¶45. However, the complaint makes clear the fact that the bank had previously revealed in statements to plaintiffs different interest payments and percentage yields. To allow plaintiffs to state a claim under this theory for statements received in the year prior to the filing of the complaint would be to allow plaintiffs to utilize the continuing violation theory. In light of the authorities discussed above, plaintiffs cannot do so.

However, plaintiffs also allege that "beginning in December 2000" defendant "has been assessing a $10.00 service charge whenever the account balance fell below ($1,000.00." Because it does not appear that the continuing violation doctrine is necessary to plead this claim, it is not barred by the statute of limitations.[14]

In accordance with the foregoing, the court cannot dispose of this claim in its entirety. Accordingly, the motion for judgment on the pleadings with respect to the first claim for relief is DENIED.

C. The breach of Contract Claim.

Defendant argues that under the California Code of Civil Procedure, the second claim (breach of contract) is governed by a four year statute of limitations and is thus barred in its entirety. Plaintiffs respond that their action "is one to recover

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14

After the hearing on this motion, defendant "refunded to Mr. diSibio the amount of $150.00, representing reimbursement in full of $10 monthly service charge paid by Mr. diSibio to the Bank from and after December 2000." Defendant thus asserts that the TISA claim regarding the services charges is "now moot." The court disagrees. TISA is a strict liability statute and plaintiffs need not show financial harm. Schnall, 279 F.3d at 219 ("We hold that to recover statutory damages under §4310, a plaintiff need not show that he ... was ... financially harmed by the failure to comply with TISA's disclosure requirements."). Moreover, TISA provides for not only actual damages, but also statutory damages and attorney fees. 12 U.S.C. §4310(a).

monies on deposit with the Bank in accordance with the terms of their deposit agreement." As such, plaintiffs argue that this claim is subject to California Code of Civil Procedure section 348, which provides that "to actions brought to recover money or other property deposited with any bank ... there is no limitation." See also City of Oakland v. Public Employees' Retirement System, 95 Cal.App.4th 1051, 1064 (1995) ("It has long been, and still is, the rule that there is no limitation upon the time in which a customer may bring an action to recover money deposited with a bank. (Code of Civ. Proc., §348.)"). Such money belongs to the depositor and the legislature could rationally conclude it should be recoverable regardless of the passage of time."); Roy Supply, Inc. v. Wells Fargo Bank, 39 Cal.App.4th 1051, 1064 (1995) ("It has long been, and still is, the rule that there is no limitation upon the time in which a customer may bring an action to recover money deposited with a bank. (Code of Civ. Proc., §348.)") Plaintiffs argue that the signature card constitutes a contract and that the legal relationship between bank and depositor is that of debtor and creditor. Plaintiffs further argue that the debt payable by defendant is both the principal and the interest. Defendant has two responses. The first is that plaintiffs' claim is not to recover money deposited in a bank, but rather one "for breach of contract to pay alleged interest rate minimums or to not assess service charges." The court disagrees, as this construction would gut §348 of its effectiveness. Most if not all actions to which §348 is applicable will be in some sense a breach of contract claim (whether express or implied). The key factor in the application of §348 seems to be the existence of the debtor/creditor relationship between the bank and the customer. See Morse v. Crocker National Bank. 142 Cal.App.3d 228, 232 (1983) ("The few decision holding that the no limitation provision was applicable shared the distinguishing feature of an established debtor-creditor relationship through a general deposit of funds.").

Next, defendant argues that the real relief plaintiffs are

seeking is unpaid interest, and that interest is not "money ... deposited" as require by §348. Again, the court disagrees. As a general matter, California courts have interpreted §348 broadly. Morse, 142 Cal.App.3d at 233 ("the language of the statute must be broadly read to include any kind of action 'to recover money deposited in a bank'"); Bullis v. Security Pac.Nat. Bank, 21 Cal.App.3d 801, 813 (1978) ("section 348 does not limit the kinds of 'actions' subject to its provisions, unlike many other statutes of limitations.") More importantly, California courts have applied §348 to actions to recover withheld interest. In Bank of America v. Cory, 164 Cal.App.3d 66 (1985), the California Controller sought to recover withheld interest and wrongfully imposed service charges which consumed or diminished dormant bank accounts to which the State was entitled under California's Unclaimed Property Law (Cal. Code of Civ. Proc., §1500, et seq.). In response to the bank's argument that the State's action was barred by the statute of limitations, the State argued that because its rights under the Unclaimed Property Law were derivative of the original depositors (the State stood in the shoes of the depositors), the State could claim the protection of §348. Cory, 164 Cal.App.3d at 74. The California Court of Appeal agreed. Id. at 75-77. Thus in Cory, §348 was applied to an action that sought as its primary relief withheld interest payments. Id. at 78 ("the Controller attempted to state an account with Bank in the amount of $9,486,149, which was the sum submitted by Bank as the amount of withheld interest and wrongfully imposed service charges which consumed or diminished dormant accounts.") Defendant does not distinguish Cory and cannot escape its effect in this case.[15] In seeking recovery of both

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15

This result makes good sense. There is no dispute that §348 applies to money deposited into interest bearing accounts. To hold that §348 preserves the depositor's right to seek recovery of the initial balance, but not any accrued interest (regardless of whether it was credited to the account by the bank) would frustrate the purpose of §348 and ignore the reason people open interest bearing accounts in the first place.

unpaid interest and improper service charges plaintiffs are seeking recovery of money deposited with the bank. Accordingly, the motion for judgment on the pleadings with respect to the second claim for relief is DENIED.

d. The Breach of the Implied Covenant of Good Faith and Fair Dealing Claim.

The third claim for relief is for breach of the implied covenant of good faith and fair dealing. Defendant argues that this claim is barred by the statute of limitations. Plaintiff responds that, because the implied covenant arises out of the contract between the parties, this claim is also governed by §348 and therefore timely.

The court finds that the claim for breach of the implied covenant is not governed by §348. While the second claim for relief is an action for breach of contract, it essentially seeks a return of the plaintiffs' property held by the bank (both the initial balance and the allegedly owed interest thereon). Accordingly, the court was able to find that the action was one "to recover money ... deposited with any bank." The implied covenant claim is altogether different in that it does not seek a return of the depositors' money, but rather seeks orders from this court declaring that various acts by defendant breached the implied covenant.

However, because this claim at least arguably alleges the acts within the statute of limitations violated the implied covenant (imposition of service charges), the court cannot dispose of this entire claim. Accordingly, the motion for judgment on the pleadings with respect to the third claim for relief is DENIED.

E. Remaining Claims – Statutes of Limitation.

Defendant argues that each of the remaining claims, at least insofar as they seek unpaid interest, are barred by the applicable

statute of limitations.[16] Plaintiffs respond that at least some actionable conduct fell within the applicable limitations period for each claim and this defendant is not entitled to judgment on the pleadings.

The complaint establishes that plaintiffs were aware of the varying interest rates being applied to their account long before the applicable statutes of limitations. However, these claims also seek relief for other alleged wrongs that defendant does not address in its motion. Accordingly, the motion for judgment on the pleadings with respect to claims four through six is DENIED.

F. Miscellaneous.

The court finds that defendant's remaining arguments are without merit, at least insofar as this motion for judgment on the pleadings is concerned.

CONCLUSION

In accordance with the foregoing, defendant's motion for judgment on the pleadings is DENIED. This order fully adjudicates the motion listed at No.13 on the clerk's docket for this case.

IT IS SO ORDERED.

Dated: September *13*, 2002

/S/ Phyllis J. Hamilton
PHYLLIS J. HAMILTON
United States District Judge

Copies mailed to counsel of record

16

Defendant argues that the §17200 has a 4 year statute of limitations, the Consumer Legal Remedies Act claim has a 3 year statute of limitations and the misrepresentation claim has a 3 year statute of limitations.

APPENDIX F

12 U.S.C. §1821(e) (1989)

(in relevant part)

§1821(e) Provisions relating to contracts entered into before appointment of conservator or receiver.

(1) Authority to repudiate contracts

In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease—

(A) to which such institution is a party;

(B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

(2) Timing of repudiation

The conservator or receiver appointed for any insured depository institution in accordance with subsection (c) of this section shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.

(3) Claims for damages for repudiation

(A) In general

Except as otherwise provided in subparagraph (C) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be—

(i) limited to actual direct compensatory damages; and

(ii) determined as of—

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages

For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include—

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

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APPENDIX G

28 U.S.C. §2106

Sec. 2106 Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court, lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.